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## Bad Boys, Whatcha Gonna Do When They Come for You: An Examination of the United States' Denial of Asylum to Young Central American Males Who Refuse Membership in Transnational Criminal Gangs

Lauren E. Sullivan

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# Bad Boys, Whatcha Gonna Do When They Come for You: An Examination of the United States' Denial of Asylum to Young Central American Males Who Refuse Membership in Transnational Criminal Gangs

*Lauren E. Sullivan\**

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## I. INTRODUCTION<sup>1</sup>

Manuel, a native Honduran, began to have encounters with MS-13, a dangerous gang active throughout Central America and parts of the United States, in January of 2004, when Manuel was fourteen years old. During his first encounter, members of the gang approached Manuel and his friend, Julio, outside the former's home in the coastal town of Puerto Cortés and told them that it was time to join the gang. The recruiter had the marks of the gang: devil horns tattooed on his forehead, the letters "M" and "S" across his chin, and teardrops around his eyes. One of the teardrops was still not filled in, indicating that the recruiter had yet to avenge someone's death. The gang recruiter took out a gun and tried to hand it to the teenage boys, ordering the boys to follow him to commit a few robberies. When Manuel and Julio re-

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1. The following story, which exemplifies the hardships of unwilling gang recruits and their families, is fictional but contains facts from various cases, including: *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012); *Aquino-Rivas v. Attorney Gen. of the U.S.*, 431 Fed. Appx. 200 (3d Cir. 2011); *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009), *abrogation recognized by Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 2008 WL 2927590 (B.I.A. 2008), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

fused to follow, the recruiter warned, "If you want to live, I will be waiting."

A few weeks later, another recruiter from the same gang approached Manuel and Julio, again telling them that it was time to join. Manuel and Julio knew that he was from the same gang because he had the same tattoos: devil horns on his forehead, "M" and "S" on his face, and teardrops around his eyes. The recruiter flashed his gun, a shiny black handgun shoved into his baggy blue jean shorts which sat far below the waistband of his boxer shorts. He told Manuel and Julio that they could either join the gang or be killed.

Manuel and Julio continued to have encounters with recruiters from the gang. Gang members stole from the boys. On one occasion, the gang members demanded that Manuel empty his pockets and hand over all of his money. When Manuel refused, they sliced his neck with a dirty pocketknife. The perpetrators told Manuel that it was a premonition of what would happen to him if he continued to refuse membership in the gang. They also warned that if Manuel told the police, "something would happen to him or his family." Manuel told his family and a teacher about the threats and showed them the cut on his neck, red and infected from lack of medical attention, but they also failed to tell the police because they were afraid of retaliation. When the gang discovered that Manuel told his family and a teacher about the threats, they broke a beer bottle against his face and threatened to kill his family. Manuel, nonetheless, remained steadfast in refusing membership.

In order to show that they meant what they said, the gang began to take action against Manuel's family. Every few days, the first person to leave the family home in the morning found a dead animal on the front step with "MS" written in blood on the front door. Members of the gang followed Manuel's sister home from her friend's house one night, dragged her into an alley, and took turns raping her. She knew that her rapists belonged to the same gang that had been threatening Manuel because she recognized the symbols tattooed all over their faces and bodies. A week later, members of MS-13 harassed Manuel's mother on her way home from the market. They called her derogatory names and knocked her bag of produce to the ground, stomping on it as they yelled profanities at her. They flashed gang symbols and showed her their weapons before running away. The food was inedible, but Manuel's mother did not have enough money to buy more. The

family went without until Manuel's father brought home his next paycheck, barely enough to provide for his family.

Gang recruiters continued to approach Manuel and ask him if he had made up his mind. They again gave him the ultimatum: join or die. Manuel decided that neither choice suited him and fled to Mexico in January of 2005. During Manuel's absence, the gang continued to threaten his family, asking them about Manuel's whereabouts. The gang harassed Manuel's mother and sister and left dead animals with threatening notes on the doorstep of the family home. Shortly after Manuel arrived in Mexico, Mexican authorities detained him and returned him to Honduras. As soon as the gang heard about Manuel's return, they threatened to kill him and his family if Manuel tried to escape again. They gave Manuel one last chance to join the gang or be killed. When Manuel refused to join, the recruiters told him that they would be looking for him and that they would take him by surprise. Everywhere Manuel went, he saw gang members watching him, sometimes casually showing a gun or a switchblade.

Manuel fled Honduras again a few days later and made it to the United States. Upon his arrival, Customs and Border Patrol agents detained him for questioning. During his credible fear interview,<sup>2</sup> Manuel explained to the interrogating officer why he had come to the U.S. without inspection.<sup>3</sup> The officer decided that Manuel had credible fear of returning to Honduras and served Manuel with a Notice to Appear, charging him with removability

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2. Section 235(b)(1)(A) of the Immigration and Nationality Act authorizes the Department of Homeland Security to subject aliens who fall into any of five specified categories to expedited removal. Immigration and Nationality Act § 235(b)(1)(A), 8 U.S.C. §1225(b)(1)(A) (West 2013); see also U.S. CITIZENSHIP & IMMIGRATION SERVICES, CREDIBLE FEAR SCREENINGS, available at <http://www.uscis.gov/uscis-tags/unassigned/credible-fear-screenings> (last updated Sept. 26, 2008). These five categories are irrelevant to this article and, therefore, will not be discussed. Aliens who qualify for expedited removal may be eligible for an exception to such removal if they are seeking asylum. *Id.* Aliens seeking asylum must be referred to an asylum officer to determine whether the individual has a credible fear of persecution or torture in his or her country of origin. *Id.* This interview is called a credible fear interview. If the asylum officer deems the alien to have credible fear of persecution or torture, the officer refers the alien to an immigration judge for the opportunity to seek asylum. *Id.* If the asylum officer determines that the alien does not have credible fear of persecution or torture, then the alien may request that an immigration judge review the alien's application. *Id.* Failure to request review by an immigration judge or a determination by the judge that the alien does not have credible fear may result in the alien's removal. *Id.*

3. "Entering without inspection" is the term used for persons who enter without being issued a visa or without being paroled. Practitioners refer to such an entrance as "entering EWI." Further discussion regarding entering EWI and its consequences is not necessary for the purposes of this article.

for being an alien present in the United States of America without being admitted or paroled.<sup>4</sup> At Manuel's final hearing in Immigration Court, the immigration judge denied him asylum and ordered him removed to Honduras.

This story is an example of what recalcitrant recruits of transnational criminal gangs in Central America face on a daily basis. These boys, some of them barely even men, come to the United States seeking refuge from the threats of death and serious bodily injury to themselves and their families. The U.S. immigration system, backlogged with requests for immigration relief, sweeps up these boys and tells them that they cannot remain in U.S. To the boys who have experienced death and harm at the hands of gangs in Central America, the immigration judge's determination that the boy does not meet the requirements of asylum is mind-boggling. They do not understand the law, and they do not understand how a judge can look them in the eye and tell them that such circumstances are not so desperate as to qualify for a grant of legal status based on persecution.<sup>5</sup> To an applicant fleeing from a gang that has repeatedly threatened and harmed him, an order of removal can be a death sentence.

In order that the reader may understand what it means to be a recruit and a member of a transnational criminal gang and how

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4. Form I-862, more commonly known as a Notice to Appear or "NTA," is a form that the Department of Homeland Security serves on an alien to begin removal proceedings. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 55 (2008), available at [http://www.justice.gov/eoir/vll/OCIJPracManual/Practice%20Manual%20Final\\_compressed\\_PDF.pdf](http://www.justice.gov/eoir/vll/OCIJPracManual/Practice%20Manual%20Final_compressed_PDF.pdf). The NTA includes, inter alia, "the nature of the proceedings, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, and the charge(s) against the alien and the statutory provision(s) alleged to have been violated." *Id.*

5. See, e.g., *Rivera-Barrientos* 666 F.3d 641, 647, 653-54 (denying a female recruit's asylum claim for failure to establish that the gang persecuted her on account of her political opinion or for membership in a particular social group); *Aquino-Rivas*, 431 Fed. Appx. 200 (denying asylum based on failure to establish that treatment based on political opinion, religious beliefs, or membership in a particular social group, as well as failure to establish that treatment of applicant amounted to persecution); *Larios v. Holder*, 608 F.3d 105, 109, 110 (1st Cir. 2010) (denying applicant's claim based on failure to establish that he belonged to a particular social group); *Ramos-Lopez*, 563 F.3d 855 (denying applicant's asylum claim for failure to establish that persecution was on account of membership in a particular social group or political opinion), *abrogation recognized by Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec 579, 2008 WL 2927590 (B.I.A. 2008) (denying Salvadoran youths asylum for failure to establish that their personal, moral, and religious opposition to gang's activities made them a particular social group), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

the gangs affect the culture of Central America, this Comment begins with a primer on some of the major transnational criminal gangs. An explanation of the law of asylum in the United States, including its origins in United Nations Declarations to which the U.S. is a signatory; a discussion of the pertinent subsections of the Immigration and Nationality Act ("the Act"); how courts have interpreted and applied the Act; and the barriers that applicants have faced in obtaining grants of asylum under the current law follow. The author will then explain how these applicants and their representatives can pursue successful asylum claims in U.S. immigration courts and federal courts by defining the particular social group as males between the ages of eleven and twenty-one years who have been targeted for gang recruitment but have refused membership.

## II. OVERVIEW OF THE PROBLEMS CAUSED BY TRANSNATIONAL CRIMINAL GANGS AND OF ASYLUM LAW IN THE UNITED STATES AND UNITED NATIONS

### A. *A Primer on Transnational Criminal Gangs*

#### 1. *Mara Salvatrucha – MS-13*

Mara Salvatrucha, more commonly known as MS-13, began in Los Angeles, California in the early 1980s.<sup>6</sup> Many Salvadorans fled to southern California to escape the civil war in El Salvador.<sup>7</sup> Upon arrival in Los Angeles, the Salvadoran youths, for their own protection from other Hispanic gangs and from racially-motivated police misconduct, formed a gang and utilized the skills they had learned fighting in the Salvadoran civil war.<sup>8</sup> As a result, many founding members had experience with firearms and explosives.<sup>9</sup> The group called itself the Mara Salvatrucha.<sup>10</sup> Since its for-

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6. Robert Walker, *Mara Salvatrucha – MS-13*, GANGS OR US (Mar. 2, 2004), available at [http://www.gangorus.com/ms\\_13.html](http://www.gangorus.com/ms_13.html).

7. *Id.*

8. *Id.*; Mandalit del Barco, *The International Reach of the Mara Salvatrucha*, NPR (Mar. 17, 2005), available at <http://www.npr.org/templates/story/story.php> (quoting Ernesto "Smokey" Miranda, one of the co-founders of MS-13, as saying, "In this country, we were taught to kill our own people, no matter if they were from your own blood. If your father was the enemy, you had to kill him. So the training we got during the war in our country served to make us one of the most violent gangs in the United States.").

9. Walker, *supra* note 6.

10. *Id.* *Mara* is a Salvadoran slang term for "gang," with the Spanish word being *pan-dilla*. Ana Arana, *How the Street Gangs Took Central America*, 84 FOREIGN AFF., no. 3,

mation in the 1980s, the gang has added the number thirteen to its name, representing (ironically) good luck and the gang's alliance with the Mexican gang La EME.<sup>11</sup>

Over the last thirty years, MS-13 has become more than simply a criminal gang; it is a transnational criminal organization, much like La Cosa Nostra.<sup>12</sup> Among the major reasons for the explosion of MS-13 membership and activity are the inability of law enforcement to control the gang and the patterns of relocation that the gang has adopted.<sup>13</sup> At its inception, MS-13 remained concentrated mainly in urban areas.<sup>14</sup> In recent years, however, members of MS-13 have been following the migratory patterns of other undocumented immigrants into labor jobs in suburban and rural areas.<sup>15</sup> The gang also uses money collected from lucrative criminal activity and membership dues to send select members to universities and community colleges so that they can enroll in business management courses.<sup>16</sup> The educated members of the gang then take on new responsibilities, handling the local cliques' finances and advising the gang's local leaders about business decisions.<sup>17</sup>

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May-June 2005, at 98, 100. A gang name beginning with the word *mara* indicates that the founding members were probably Salvadoran, *id.*, although this is not always true, as with the Mexican gang Mara 18. *Salvatrucha* is a Salvadoran slang term for a shrewd Salvadoran man. *Id.* at 100.

11. Walker, *supra* note 6. "M" is the thirteenth letter of the alphabet and the first letter of the Spanish name for La EME, or the Mexican Mafia. "La EME" is the phonetic spelling often utilized by the gang. La EME is not discussed in this article because it does not have substantial territory in Central America. La EME began in the correctional institutions of California in the 1950s and remains predominantly in the southern and southwestern U.S. Robert Walker, *The Mexican Mafia Prison Gang: Profile, Background & History: A Security Threat Group - STG*, GANGS OR US (Oct. 23, 2012), available at [http://www.gangsorus.com/mexican\\_mafia.htm](http://www.gangsorus.com/mexican_mafia.htm).

12. Fed. Bureau of Investigation, *Italian Organized Crime*, ORGANIZED CRIME, [http://www.fbi.gov/about-us/investigate/organizedcrime/italian\\_mafia](http://www.fbi.gov/about-us/investigate/organizedcrime/italian_mafia) (last visited Dec. 29, 2013). La Cosa Nostra, also known as the American Mafia, has its roots in organized crime syndicates from Italy. *Id.* It consists of different crime "families" organized throughout metropolitan areas of the United States, Canada, and South America. *Id.*

13. Jeffrey D. Corsetti, *Marked for Death: The Maras of Central American and Those who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 409 (2006).

14. SAM LOGAN & ASHLEY MORSE, MS-13 ORGANIZATION & U.S. RESPONSE, 3 (2007).

15. *Id.*

16. *Id.* at 13.

17. *Id.* For an analogy familiar to most, think of the character of Tom Hagen in *The Godfather*. Vito Corleone takes the orphaned Hagen under his wing. THE GODFATHER (Paramount Pictures 1972). When Hagen completes law school, he remains loyal to the Corleones, offering the skills he acquired throughout his education to benefit the family who gave Hagen the opportunity. *Id.*



Because the majority of MS-13 members are between the ages of eleven and twenty-one, they are also adept at using technology.<sup>18</sup> Law enforcement agencies have been slow to adapt to the gang's new ways of organizing criminal activity and establishing new cliques. With cliques taking root in suburbs and rural areas all across the United States and in parts of Canada<sup>19</sup> where police departments might not have any officers who speak Spanish,<sup>20</sup> MS-13 faces few obstacles in executing its goals—or its rivals. Law enforcement agencies cannot adequately handle the problem; their answer is to deport arrested gang members who are in violation of immigration laws.<sup>21</sup> The unforeseen and unintended result of deporting gang members has been that they have established cliques in their countries of origin<sup>22</sup> and continued to spread through Latin America, the United States, and Canada.<sup>23</sup>

In Central America, where MS-13 reigns with a fist as strong as the totalitarian governments that once ruled, MS-13 members often assassinate their enemies in broad daylight, aboard public transportation or in the streets, and walk away from the scene untouched.<sup>24</sup> Law enforcement agencies are threatened and intimidated by gang members,<sup>25</sup> lack the ability to control the gang,<sup>26</sup>

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18. Walker, *supra* note 6. Walker states that MS-13 has an extensive internet presence in which members boast of their crimes, taunt rivals, and communicate with one another. *Id.* “[Drug and arms dealers, car jackers and lookouts carry wireless phones, pagers, radios and police scanners.” *Id.*

19. *Id.*

20. LOGAN & MORSE, *supra* note 14, at 13.

21. Shelly Feuer Domash, *Taking Gangs to Task*, POLICE, Feb. 1, 2006, at 2. In an interview with Det. Ricky Smith of the Hempstead Village Police Department in Nassau County, New York, Det. Smith said, “We eventually locked up two people, and deported them, and after that the threat pretty much went away.” *Id.*

22. Robert J. Lopez, Rich Connell & Chris Kraul, *MS-13: An International Franchise: Gang Uses Deportation to Its Advantage to Flourish in U.S.*, L.A. TIMES (Oct. 30, 2005), available at <http://www.latimes.com/news/local/la-me-gang30oct30,0,6717943.story>.

23. Walker, *supra* note 6.

24. *Id.*

25. U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: Guatemala (2012), available at <http://www.state.gov/documents/organization/204664.pdf>.

26. Walker, *supra* note 6. A police officer for Fairfax County, Virginia said of MS-13, “We know it is a losing battle. When we run them out of here, we just move them to another location. We just contain what we have. We know we can't get rid of them.” *Id.* The police officer's quote reflects a criminological theory known as displacement. According to displacement theory, removing the opportunity for a crime does not actually prevent future crime but merely moves it to another location. See generally MARCUS FELSON & RONALD V. CLARKE, OPPORTUNITY MAKES THE THIEF: PRACTICAL THEORY FOR CRIME PREVENTION (Barry Webb ed., 1998). Felson and Clarke identify five types of displacement: (1) geographical, in which crime moves from one location to another; (2) temporal, in which crimes are moved from one time to another; (3) target, in which perpetrators change the object of

are on the gang's payroll,<sup>27</sup> or collaborate with gang members to commit crimes.<sup>28</sup> For these reasons, law enforcement agencies in Central America should fulfill one of the requirements that an asylum applicant must establish—that the persecution is done by a group that the government is either unable or unwilling to control.<sup>29</sup>

## 2. *Mara 18 – Eighteenth Street Gang*

Mara 18, like MS-13, has its beginnings in Los Angeles, California, although the year of its inception is difficult to pinpoint.<sup>30</sup> Mara 18, whose original name in the United States was Eighteenth Street Gang, began as a collection of Mexican youths who arrived in the U.S. with their parents, hoping to escape the rampant poverty, political oppression, and military conflicts in Mexico.<sup>31</sup> The gang spread to Mexico and throughout the rest of Central America when the U.S. tightened its reins on undocumented

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the crime; (4) tactical, in which perpetrators substitute a different method of committing a crime; and (5) crime type, in which perpetrators substitute one type of crime for another. *Id.* at 25. What the Fairfax County police officer identifies as a problem is an example of geographical displacement. When this occurs, the overall rate of crime does not decrease. A commonly-used example is that of two motels located on opposite sides of a township line. Prostitutes and johns frequent one motel in Township A to carry out their “transactions.” The other motel in Township B does not have such a problem. When citizens of Township A, the one containing the motel often used for prostitution, complain to their mayor and police commissioner, the local police department increases surveillance at the motel, and the criminal justice system pursues more convictions and stiffer sentences for prostitution. After some time, the prostitutes and johns simply move their activities to the motel across the township line, in another jurisdiction. On paper, it appears that the incidence of prostitution has significantly decreased in Township A. However, there is no change in the quality of life of the township because it is no more difficult for perpetrators to commit the crime. Having to cross a township line has no deterrent effect.

27. Corsetti, *supra* note 13, at 415. Like *The Godfather* in *supra* note 17, another Al Pacino film serves as an example of this situation. Recall in the 1973 film *Serpico* how NYPD cops regularly accept a portion of the proceeds from illegal gambling operations in exchange for allowing the operations to continue. *SERPICO* (Paramount Pictures 1973).

28. Corsetti, *supra* note 13, at 415.

29. *See, e.g., Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011) (denying asylum because petitioner failed to show that Mexican Government was unable or unwilling to control his attackers).

30. Wim Savenije, *Las pandillas transnacionales o “maras”: violencia urbana en Centroamérica*, 47 *FORO INTERNACIONAL* 637, 640-41 (2007). Savenije suggests that since Mexican immigrants began to trickle into the neighborhoods of Los Angeles in the early part of the nineteenth century, the youths, like many other ethnic groups new to the United States, banded together and developed their own unique style. *Id.* For example, the youths wore zoot suits throughout the 1930s and 1940s and adopted the style of heavy metal rock musicians during the 1980s and 1990s. *Id.* It is impossible to determine when exactly the group ceased to be merely a collection of individuals of the same ethnic background, some of whom engaged in criminal activity, and became a criminal gang. *Id.*

31. *Id.*

immigrants.<sup>32</sup> As the INS executed its policy of removing immigrants with criminal histories, the gang took root in Central America, recruited new members, and returned to the U.S.<sup>33</sup> Today, Mara 18's territory stretches from Canada<sup>34</sup> to parts of Nicaragua.<sup>35</sup>

Mara 18 has been diversifying ethnically as well as geographically. Since its birth on the streets of Los Angeles, Mara 18 has opened membership to youths from other Latin American countries, multi-ethnic persons, blacks, whites, Asians, and Native Americans.<sup>36</sup> Mara 18 recruits elementary and middle-school aged children<sup>37</sup> to begin early indoctrination into the culture and strict rules of the gang. It preys on children who are poor, marginalized, and lack any prospect of future employment and economic stability.<sup>38</sup> Children in such situations are easier to manipulate and see the gang as an opportunity to belong, to be cared for, and to make ends meet.

In order to maintain power and control over its territory, the gang will threaten, extort, beat, or kill their opposition. When persons in the community take action against the gang, such as by refusing to cooperate with the gang or reporting gang activity to the police, the gang retaliates with violence.<sup>39</sup> Like other violent criminal gangs, Mara 18 follows the doctrine of "blood in, blood out."<sup>40</sup> One of the ways in which a new recruit can join the gang officially is by killing another person—"blood in."<sup>41</sup> Virtually the only way to leave the gang is by dying—"blood out." Members who elect to leave the gang are often killed.<sup>42</sup>

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32. *Id.* at 642, 646.

33. *Id.*

34. Al Valdez, Orange Cnty. Dist. Attorney's Office, *California's Most Violent Export* (2000), available at <http://www.streetgangs.com/news/013002-californias-most>.

35. See generally Savenije, *supra* note 30.

36. Valdez, *supra* note 34.

37. *Id.* For this reason, Orange County (California) law enforcement officers call the gang the "Children's Army." *Id.*

38. Savenije, *supra* note 30, at 646.

39. *Id.* at 650.

40. Robert Walker, *Background on Gang Initiations*, GANGS OR US (Dec. 13, 2011), available at <http://www.gangsor.us/initiations.html>.

41. *Id.*

42. *Id.* In some instances, the departing member will not be outright murdered but will have to endure a "beat out" in which fellow members beat the departing member. *Id.* Often, however, the beating is so severe that the departing member dies as a result. Valdez, *supra* note 34. Valdez reproduces what a young boy belonging to Mara 18 told to his probation officer: "I cannot avoid associations with other 18th Street gang members because they call me all the time, and if I don't go with them, they will say I am a ranker . . . . There is only one way out, and that's in a body bag." *Id.* A ranker is someone who associates with a

Departing members, law enforcement, and members of rival gangs are not the only persons in danger. Mara 18 members are sophisticated tax collectors. The gang collects taxes from any business, legitimate or illegal, that operates within Mara 18 territory.<sup>43</sup> If a business owner fails to pay the tax, he or she receives death threats.<sup>44</sup> Gang members rarely face prosecution or incarceration for their crimes because law enforcement and the judiciary lack sufficient resources to adequately perform their duties and often play a role in the lucrative activities of the gang.<sup>45</sup>

### B. *Asylum Law in the United States and Its Origins*

Article 14 of the Universal Declaration of Human Rights, adopted in 1948, provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”<sup>46</sup> In 1951, the United Nations adopted the Convention Relating to the Status of Refugees (“the Convention”), which recommended that governments should continue to receive persons fleeing their home countries because of persecution so that these persons may find “asylum and the possibility of resettlement.”<sup>47</sup> However, the United Nations limited the scope of the 1951 Convention to persons fleeing events that occurred in Europe prior to January 1, 1951.<sup>48</sup> Clearly, the intention of the drafters was to assist persons who were the targets of extermination by the totalitarian regimes of Europe shortly before and during the Second World War. In 1967, however, the United Nations expanded the scope of the Convention by removing the location and time limitations,<sup>49</sup> indicating that the drafters intended member States to give a broad con-

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gang but is too afraid to engage in the gang’s dangerous or criminal activities. See URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=ranker> (last visited Oct. 25, 2012). As described above, the consequences of being labeled a ranker can be severe. Valdez, *supra* note 34.

43. Valdez, *supra* note 34.

44. *Id.*

45. Corsetti, *supra* note 13, at 409, 416.

46. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml#a14>.

47. Office of the U.N. High Comm’r for Refugees, Convention and Protocol Relating to the Status of Refugees, 11 (Dec. 2010), available at <http://www.unhcr.org/3b66c2aa10.html> (UNHCR, Convention and Protocol).

48. *Id.* at 2.

49. *Id.* The United States of America was not originally a signatory of the Universal Declaration of Human Rights or of the 1951 Protocol; however, the United States adopted the 1967 Protocol. The United States has reservations to some of the provisions but none that fall within the scope of this article.

struction to their respective domestic legislation<sup>50</sup> regarding the grant of asylum. Yet the United States' statutory definition of "refugee" is rather narrow,<sup>51</sup> and courts often deny asylum if the applicant reaches safety in the U.S. without having suffered physical harm.<sup>52</sup>

The problem with this approach is that persecution does not just encompass physical harm; it can include, inter alia, threats, intimidation, harm to family members, and destruction of property (if it is severe enough to destroy the victim's livelihood). Gangs in Central America maintain power by instilling fear in others. They intimidate witnesses and government officials who vow to target street gangs and who attempt to institute new laws and policies aimed at extinguishing the power of criminal gangs.<sup>53</sup> For persons who refuse membership in a gang after the gang expresses a desire for their allegiance, the penalty can be death.<sup>54</sup> The consequences of refusing gang membership also include threats and violence to the recalcitrant recruit's family.<sup>55</sup> With such pressure on young men to join a gang, it is no wonder that these young men flee their home countries and seek refuge in the United States.

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50. International laws that do not require domestic legislation to become effective domestic law are called self-executing treaties. See, e.g., *Medellín v. Tex.*, 552 U.S. 491, 491 (2008) ("While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be 'self-executing' and is ratified on that basis."). It is the responsibility of signatory States to enact their own legislation in accordance with the principles of the Convention. Without domestic laws that make the Convention effective, the Convention offers little protection for refugees.

51. Wendy B. Davis & Angela D. Atchue, *No Physical Harm, No Asylum: Denying a Safe Haven for Refugees*, 5 TEX. F. ON C.L. & C.R. 81, 81 (2000) (referencing 8 U.S.C. § 1101(a)(42)(A) (1994) and 8 C.F.R. § 208.13(b)(1) (1999)).

52. Davis & Atchue, *supra* note 51, at 82.

53. Walker, *supra* note 6. A common way of intimidating witnesses and government officials is to send them the dismembered body of a male accompanied by a threatening or intimidating note. *Id.* In 2004, just two weeks after his inauguration, Guatemalan President Óscar Berger received such a delivery. *Id.* The following month, Honduran President Ricardo Maduro received a similar delivery with a note that said, "[M]ore people will die. This is another challenge—the next victims will be police and journalists." *Id.*

54. Corsetti, *supra* note 13, at 428 (citing Telephone Interview with Leonel Dubon, Program Dir., Casa Alianza (Mar. & Apr. 2005); Written Correspondence with Leonel Dubon, Program Dir., Casa Alianza, to Jeffrey D. Corsetti, Georgetown Immigration Law Journal (Mar. & Apr. 2005)).

55. Corsetti, *supra* note 13, at 422, 434 (citing Telephone Interview with Emilio Goubaud, Exec. Dir., Ass'n for Crime Prevention (Mar. & Apr. 2005); Written Correspondence with Emilio Goubaud, Exec. Dir., Ass'n for Crime Prevention (Mar. & Apr. 2005)).

A grant of asylum in the United States requires that the applicant prove that he or she meets the status of a refugee under the Immigration and Nationality Act.<sup>56</sup> The INA defines a refugee as:

any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .<sup>57</sup>

The applicant must prove (1) a well-founded fear of persecution that is (2) on account of one of the five enumerated grounds and (3) by an organization that the government is unable or unwilling to control.<sup>58</sup> The first element, demonstrating a well-founded fear of persecution, is two-fold, having a subjective and an objective element.<sup>59</sup> First, the applicant must show that he or she genuinely has fear.<sup>60</sup> Next, the applicant must demonstrate that a reasonable person in like circumstances would fear persecution.<sup>61</sup>

Of the five grounds upon which to base an asylum claim, membership in a particular social group and political opinion are the most nebulous and discretionary bases for granting asylum. For this reason, attorneys often use these categories when their clients have a strong case for persecution but not on the other three grounds—race, religion, and nationality—which are generally easier to prove but have less flexible parameters. Seeking asylum based on the more nebulous bases, however, can pose substantial difficulties when arguing that a client fits into a social group or has a political opinion that the Executive Office of Immigration Review has yet to define and to determine to be a basis for asylum. Judges are reluctant to grant asylum based on a flexible category

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56. 8 U.S.C.A. § 1158(b)(1) (2006); INA § 208(b)(1) (2010), available at <http://www.uscis.gov>.

57. 8 U.S.C.A. § 1101(a)(42)(A) (2006); INA § 101(a)(42)(A) (2010), available at <http://www.uscis.gov>.

58. Corsetti, *supra* note 13, at 417 (citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)).

59. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

60. See *Yong Hao Chen v. INS*, 195 F.3d 198, 201-02 (4th Cir. 1999); see also *Matter of Mogharabbi*, 19 I. & N. Dec. 439, 444-45 (B.I.A. 1987).

61. *Yong Hao Chen*, 195 F.3d at 201-02; *Matter of Mogharabbi*, 19 I. & N. Dec. at 444-45.

for fear of opening up the floodgates.<sup>62</sup> Therefore, attorneys and accredited representatives must define the social group to which their clients belong narrowly enough to eradicate the judges' concerns but broadly enough to reasonably constitute a social group that includes more people than just the client or the client's family.

Perhaps the most difficult part of defining this social group is that the attorney faces the danger of creating a tautology. The social group cannot be defined by the persecution.<sup>63</sup> Additionally, the common characteristic that defines the social group must be an immutable characteristic, "one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."<sup>64</sup>

The applicant must also demonstrate that there is a nexus between the type of persecution and one of the five enumerated grounds.<sup>65</sup> In other words, the persecution must be a direct result of the applicant's race, religion, nationality, membership in a particular social group, or political opinion.<sup>66</sup> The burden is on the applicant to provide some evidence that one of the five enumerated grounds was a motive for the persecutor's actions.<sup>67</sup> In denying an applicant's asylum petition, courts often rely on an insufficient nexus between one of the five grounds and the persecutor's actions.<sup>68</sup>

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62. Corsetti, *supra* note 13, at 408 (citing *Romero-Rodriguez v. U.S. Attorney Gen.*, 131 Fed. Appx. 203, 204 (11th Cir. 2005)).

63. See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); see also *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003). For example, women seeking asylum from West African nations that practice female genital mutilation (commonly known as "FGM") and who have undergone the procedure themselves cannot define their particular social group as women who are victims of FGM. This reasoning results in a tautology: the form of persecution is FGM, and the social group is women who have undergone FGM. The social group or political opinion must be in existence prior to the persecution, and the persecution must be a result of membership in the social group before the persecution occurred.

64. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987) (requiring an immutable characteristic or presence of a characteristic that the applicant should not be required to change). The *Acosta* court's construction of member of a particular social group was to preserve refuge for "individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution." *Id.* at 234.

65. 8 U.S.C.A. § 1101(a)(42)(A) (2006); INA § 101(a)(42)(A) (2010), available at <http://www.uscis.gov>; Davis & Atchue, *supra* note 51, at 89.

66. 8 U.S.C.A. § 1101(a)(42)(A); INA § 101(a)(42)(A), available at <http://www.uscis.gov>.

67. *Lukwago*, 329 F.3d at 170 (citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

68. Davis & Atchue, *supra* note 51, at 89. For example, it is not enough for a Coptic Christian who has fled from Egypt to prove that a group of men beat him up as he was passing through a market in Cairo. The event could have been the result of a random act of

The purpose of the asylum statute was to give “statutory meaning to our national commitment to human rights and humanitarian concerns;”<sup>69</sup> however, courts are hesitant to grant asylum to persons who are persecuted for refusing membership in a Central American criminal gang. One of the reasons why courts are hesitant is that many asylum applicants have not suffered physical harm.<sup>70</sup> Another reason that courts are hesitant to grant asylum is that they do not fully understand that law enforcement in Central America largely either cannot or will not take adequate measures to combat gang violence.<sup>71</sup>

### C. *Common Hindrances to Recalcitrant Recruits’ Petitions for Asylum*

#### 1. *Denial of Applicant’s Claim for Asylum for Failure to Establish Membership in a Particular Social Group*

Persons attempting to qualify for asylum on account of membership in a particular social group must meet three requirements: the applicant must (1) “identify a group that constitutes a ‘particular social group’ within the interpretation just discussed, (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.”<sup>72</sup> Establishing a particular social group appears to be the most difficult prong to prove for young men who refuse gang recruitment. Courts often hold that the proposed particular social group—young males who refuse membership in Central American gangs—lacks particularity<sup>73</sup> and

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violence. Rather, the Coptic Christian must prove that the group beat him up *because* he is a Coptic Christian, which is the second enumerated ground for granting asylum (i.e. religion). The applicant also must prove additional facts which will be discussed later in this article.

69. *Id.* at 81 (citing *Selgeka v. Carroll*, 184 F.3d 337, 343 (4th Cir. 1999)).

70. *Id.* at 82.

71. *See, e.g.*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Guatemala (2011); *see also* U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Mexico (2011); U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: El Salvador (2011); U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Honduras (2011).

72. *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993).

73. *See Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (holding that the purported definition of particular social group lacked particularity because the term “young” is amorphous); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563



social visibility,<sup>74</sup> and thus will not grant the applicant's asylum petition.

*a. Particularity*

Particularity requires that the proposed group be accurately described in a manner sufficiently distinct that the group would be recognized in the applicant's society as a discrete class of persons.<sup>75</sup> In other words, the applicant's definition of a particular social group will be denied if the court determines that the definition is too broad or lacks a unifying characteristic. It is understandable that courts try to balance their responsibility to avoid opening the floodgates to an unmanageable number of immigrants with the United States' commitment to defend human rights and address humanitarian concerns. However, the particularity requirement places an excessive burden on applicants who have bona fide claims of human rights violations in that it forces persecuted individuals to acquire and maintain records of their persecution and to prove that others would recognize the persecution. Many times, applicants do not report the persecution to law enforcement because of fear of retaliation by the gang<sup>76</sup> or because the police fail to do anything about the persecution.<sup>77</sup> An applicant brave enough to seek medical treatment for severe injuries resulting from the persecution will most likely keep the cause of the injuries to himself, so there will be no medical records to prove

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F.3d 855, 861 (9th Cir. 2009), *abrogation recognized by* *Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585, 2008 WL 2927590, \*\*6 (B.I.A. 2008) (holding that young males who refuse gang membership lacks particularity because what constitutes "young" is relative and is not particular), *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

74. See *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012); *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Matter of S-E-G-*, 24 I. & N. Dec. at 588, 2008 WL 2927590, at \*\*8, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

75. See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. at 584, 2008 WL 2927590, at \*\*5, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

76. *Savenije*, *supra* note 30, at 650.

77. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Guatemala (2011); see also U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Mexico (2011); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: El Salvador (2011); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Honduras (2011).

that any physical injuries were the result of persecution. Therefore, there will be no record of the persecution other than the applicant's sworn affidavit or the testimony of any witnesses who, for whatever reason, are not afraid to testify to the circumstances of the persecution.<sup>78</sup>

Additionally, the U.N. High Commissioner for Refugees has stated that the size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2) of the 1951 Convention and its 1967 Protocol.<sup>79</sup> The policy behind the Commissioner's guideline is that where a group or organization violates another person's human rights, the size of the persecuted group should not be a basis for denying asylum. Basic human rights of life and freedom should be of primary concern to U.N. member States. To abate member States' concerns about handling a sudden and significant influx of migrants claiming refugee status based on persecution, the Commissioner adds that the claimant still must "demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria."<sup>80</sup> Nevertheless, United States Courts of Appeals have repeatedly rejected applicants' claims for asylum based on persecution for refusing recruitment into a transnational criminal gang.<sup>81</sup>

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78. Reasons that witnesses do not fear giving their testimony may include their presence in the U.S., out of the reach of the persecutors, or their ability to mail written testimony to the court without the knowledge of the persecutors.

79. Office of the U.N. High Comm'r for Refugees, Guideline on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, ¶ 18, U.N. Doc. HCR/GIP/02/02 (2002) (UNHCR, Guideline).

80. *Id.* These "other relevant criteria" include, for example, proving that the persecution is on account of a group that the government in the applicant's country of origin are either unable or unwilling to control. See, e.g., *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011).

81. See, e.g., *Garcia-Callejas v. Holder*, 666 F.3d 828, 829 (1st Cir. 2012); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653-54 (10th Cir. 2012); *Aquino-Rivas v. Attorney Gen. of the U.S.*, 431 Fed. Appx. 200, 203 (3d Cir. 2011); *Larios v. Holder*, 608 F.3d 105, 108-09 (1st Cir. 2010); *Barrios v. Holder*, 581 F.3d 849, 852 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009), *abrogation recognized by Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 2008 WL 2927590 (B.I.A. 2008), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

b. *Social Visibility*

In determining whether the applicant's purported social group meets the second requirement, social visibility, the court must consider the shared characteristic in the context of the country of concern and the persecution feared.<sup>82</sup> The United States Court of Appeals for the Tenth Circuit concluded in *Rivera-Barrientos v. Holder*<sup>83</sup> that, in order to demonstrate social visibility, an asylum applicant must meet two conditions: (1) the citizens of the applicant's country would consider individuals with the pertinent trait to constitute a distinct social group and (2) the applicant's community is capable of identifying an individual as belonging to the group.<sup>84</sup> Social visibility, according to the *Larios v. Holder*<sup>85</sup> court, requires that the applicant demonstrate that the purported group is "generally recognized in the community as a cohesive group."<sup>86</sup> However, the High Commissioner for Refugees has specifically stated that there is no requirement of cohesiveness.<sup>87</sup> The overarching problem is the dissidence between the High Commissioner for Refugees' intention that persecuted persons can find a safe haven in U.N. member States and the narrowly construed asylum laws promulgated by the United States. The United States' attempt to circumvent the Articles and Protocol which it signed and to which it expressed no reservations<sup>88</sup> by failing to enact legislation in line with the policy of the Articles and Protocol<sup>89</sup> gives persecuted persons abroad false hope.

2. *Proving that the Persecution is by an Organization that Law Enforcement and Governments are Unable or Unwilling to Control*

Recall the third overarching requirement: that applicants prove the persecution was committed by an organization that the gov-

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82. *Matter of S-E-G*, 24 I. & N. Dec. at 586-87, 2008 WL 2927590, at \*\*7, *disagreed with* by Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

83. 666 F.3d 641 (10th Cir. 2012).

84. *Id.* at 650-51.

85. 608 F.3d 105 (1st Cir. 2010).

86. *Id.* at 109 (citing *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010)).

87. UNHCR, Guideline, *supra* note 79, at ¶ 15.

88. As stated above in note 46, the United States has submitted reservations to the 1967 Protocol; however, these reservations are not pertinent to the topic of this article or the laws for granting asylum in the first place.

89. *Matter of Acosta*, 19 I. & N. Dec. 211, 211 (B.I.A. 1985) (stating that the Protocol and Handbook published by the UNHCR are "neither binding upon the United States nor controlling as to construction of the Refugee Act of 1980").

ernment is unable or unwilling to control.<sup>90</sup> Law enforcement agencies in Central America fail to address the problems created by transnational criminal gangs because many officers cooperate with the gangs.<sup>91</sup> Many politicians and members of the judiciary also benefit from corruption. In Guatemala especially, widespread corruption afflicts the police and the judiciary.<sup>92</sup> In theory, the judiciary is an independent branch of government. In practice, however, there are reports of ineffectiveness and manipulation, such as granting frivolous motions for continuances to delay cases and prolonging the trial and appellate processes.<sup>93</sup> Various agencies of the Guatemalan government, although having the responsibility of overseeing reports of judicial and police misconduct, lack the necessary resources to adequately address the problem<sup>94</sup> and themselves are not free from the crippling effects of corruption. For example, General Francisco Ortega Menaldo, the former Guatemalan Chief of Intelligence, once led one of the five key mafias in Guatemala.<sup>95</sup>

Police officers and judges who attempt to legitimize the legal system from the inside out face opposition from their peers and continual threats, intimidation, and scrutiny.<sup>96</sup> In 2010, the Special Prosecutor for Crimes against Judicial Workers received 154 complaints of threats or aggression;<sup>97</sup> this number jumped to 243 in 2011.<sup>98</sup> Arrests rarely result in prosecution because investigators, judges, and witnesses are intimidated and threatened.<sup>99</sup> The United States Department of State reports the same issues in

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90. See, e.g., *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011); see also, Corsetti, *supra* note 13, at 417. To return to our example of the Coptic Christian from Egypt in note 68, what if the men who beat up the applicant on account of his religion were caught by the police, convicted, and incarcerated for their crime? In this instance, the persecution would be committed by a group that law enforcement is able and willing to control. The Coptic Christian applicant need not continue to fear living in Egypt on account of his religion because the threat has ceased. He does not have a reasonable fear of future persecution, and courts will deny his asylum claim.

91. *Id.* at 415.

92. U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Guatemala (2011).

93. *Id.*

94. *Id.*

95. Tim Johnson, *Guatemalan Seeks Global Help to Lower Crime in Weary Land*, THE COLOMBIAN POST, (Feb. 10, 2003), available at <http://www.thecolombianpost.com/index.php>.

96. U.S. DEPT OF STATE, *supra* note 92.

97. *Id.*

98. *Id.*

99. *Id.*

Mexico,<sup>100</sup> El Salvador,<sup>101</sup> Honduras,<sup>102</sup> and Nicaragua.<sup>103</sup> For this reason, citizens rarely seek help from the police or go through the courts to resolve their problems. They either take the law into their own hands or continue to allow themselves to be victimized.

The only alternative for recalcitrant gang recruits is to leave their homeland and settle in what they have been told all their lives is the “promised land”; the “land of opportunity”; a country that has jobs, prosperity, a stable government, police forces with integrity and training, and laws specifically pertaining to the protection of persecuted individuals—the United States of America. For many people throughout the world, the U.S. is still the beacon of hope that it was for countless Western and Northern Europeans in the mid-1800s<sup>104</sup> and numerous Southern and Eastern Europeans from 1880 to 1920.<sup>105</sup> Unfortunately for these more recent immigrants who seek a safe haven from persecution at home, the beacon is snuffed out by the bureaucratic red tape of United States immigration policy and a narrow interpretation of the asylum statute.

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100. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Mexico (2011) (reporting that corruption, inefficiency, and lack of transparency continue to be problems within the judiciary and that corruption plagues law enforcement and prison officials).

101. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: El Salvador (2011). The report stated that among the principal human rights violations in El Salvador are widespread corruption in the judicial system and weaknesses in the judiciary and security forces that lead to a high level of impunity. Because there is rampant corruption among political parties and the government, corrupt officials and judges rarely receive any sanctions for their behavior.

102. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Honduras (2011). According to the U.S. Department of State, the most serious human rights violations in Honduras are corruption in the national police force and institutional weakness of the judiciary. There is insufficient funding for witness protection programs, as well. As a result, the public lacks trust in the legal system.

103. See generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: Nicaragua (2011). Although the previously discussed transnational criminal gangs do not have a strong presence in Nicaragua, the country experiences the same issues at the hands of smaller local gangs. In recent years, though, MS-13 and Mara 18 have been making alliances with Nicaraguan gangs.

104. Philip Martin & Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, 58 POPULATION BULLETIN, no. 2, Jun. 2003, at 1, 12, available at <http://www.prb.org/Source/58.2ImmigrShapingAmerica.pdf>.

105. *Id.*

### III. ANALYSIS: PAVING THE PATHWAY TO ASYLUM

Gang recruits who apply for asylum in the United States face numerous obstacles. Courts often deny their claims for failure to define the applicant's purported social group with sufficient particularity<sup>106</sup> or social visibility.<sup>107</sup> Applicants also have difficulty proving that the treatment they suffered at the hands of gang members rises to the level of persecution.<sup>108</sup> Applicants and their attorneys or accredited representatives will have a greater likelihood of obtaining a grant of asylum if they define the social group as men between the ages of eleven and twenty-one years who have been recruited by violent criminal gangs but have refused membership and if they provide some proof of physical harm.

#### A. *Defining a Particular Social Group with Sufficient Particularity and Social Visibility*

As stated above, courts generally deny asylum to applicants who have fled their home countries after being persecuted for refusing gang membership because the proposed social group lacks particu-

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106. See *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (holding that the purported definition of particular social group lacked particularity because the term “young” is amorphous); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009), *abrogation recognized by Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585, 2008 WL 2927590, \*\*6 (B.I.A. 2008) (holding that young males who refuse gang membership lacks particularity because what constitutes “young” is relative and is not particular), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

107. See *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012); *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Matter of S-E-G-*, 24 I. & N. Dec. at 588, 2008 WL 2927590, at \*\*8, *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

108. See *Davis & Atchue*, *supra* note 51, at 85 (citing *Asani v. I.N.S.*, 154 F.3d 719, 723 (7th Cir. 1998) (defining persecution as “punishment or the infliction of harm which is administered on account of” one of the five enumerated grounds)); see also *Mikhailevitch v. I.N.S.*, 146 F.3d 384, 390 (6th Cir. 1998) (holding that persecution “requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty”); *Mroz v. Reno*, No. 96-1252, 1997 WL 139762, at \*2 (10th Cir. 1997). The Courts of Appeals for the First and Ninth Circuits recognize that this trend leads to the “absurd result of denying asylum to those who have actually experienced persecution and were fortunate enough to survive.” *Davis & Atchue*, *supra* note 51, at 86 (citing *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 489 (1st Cir. 1994) and *Del Valle v. I.N.S.*, 776 F.2d 1407, 1413 (9th Cir. 1985)). The inconsistencies among the jurisdictions puts a substantial burden on refugees seeking asylum status in the United States; refugees do not have the resources to research where they should resettle in order to be recognized as having been persecuted on one of the five enumerated grounds.

larity<sup>109</sup> and social visibility.<sup>110</sup> In order to rectify this problem, applicants and their representatives can begin by defining the purported social group as eleven- to twenty-one-year-old males who are sought by transnational criminal gangs for membership but refuse. This definition meets all of the requirements established by the Board of Immigration Appeals (“BIA”) and United States Courts of Appeals in that it is particular<sup>111</sup> and socially visible.

### 1. *Satisfying the Particularity Requirement*

The first requirement that the applicant must meet is that the purported social group is “particular,”<sup>112</sup> meaning that in the applicant’s society, others will recognize the group as a discrete class of persons.<sup>113</sup> Although the U.N. High Commissioner for Refugees has already promulgated guidelines stating that signatory States to the 1967 Protocol Relating to the Status of Refugees (including the United States of America) should not consider the size of the group when determining a definition for the group,<sup>114</sup> guidelines do not seem to have had any persuasive effect on the United States’ immigration policy regarding asylum. Therefore, it might be more practical to call for slow, moderate change rather than suggesting that courts completely overturn their precedent.

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109. See *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Ramos-Lopez*, 563 F.3d at 861, *abrogation recognized by* *Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. at 585, 2008 WL 2927590, at \*\*5-7, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

110. See *Rivera-Barrientos*, 666 F.3d at 653; *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Matter of S-E-G-*, 24 I. & N. Dec. at 588, 2008 WL 2927590, at \*\*8, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

111. In *Rivera-Barrientos*, the Court of Appeals for the Tenth Circuit held that a particular social group of Salvadoran women between the ages of twelve and twenty-five years who have resisted gang recruitment meets the requirement of particularity. 666 F.3d 641, 650 (10th Cir. 2012).

112. See *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Ramos-Lopez*, 563 F.3d at 861, *abrogation recognized by* *Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. at 585, 2008 WL 2927590, at \*\*6, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

113. *Matter of S-E-G-*, 24 I. & N. Dec. at 584, 2008 WL 2927590, at \*\*5, *disagreed with by* *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

114. UNHCR, Guideline, *supra* note 79, at ¶ 18.

a. *Age Limitation*

For this particular issue, the applicant's society would be the applicant's country of origin which, in this case, would be any Central American country. The first criterion of the author's proposed definition of particular social group—that the applicant is between the ages of eleven and twenty-one years—can be grounds for asylum when the individual faces persecution while that individual's age places him within the group, even though age in itself is not an immutable characteristic.<sup>115</sup> Choosing this age range is not arbitrary; MS-13 and Mara 18 typically recruit males between the ages of eleven and twenty-one years.<sup>116</sup> Recognizing that gang recruitment occurs during a discrete time in a young man's life narrows the purported social group to recruits who experience persecution as an immediate result of their refusal while they are still within the age of recruitment. Giving a discrete age range rather than defining the applicant as "young" avoids the problem that the applicants in *Larios*<sup>117</sup> and *Matter of S-E-G*<sup>118</sup> experienced—namely, that defining a group merely as "young" is "amorphous"<sup>119</sup> and "relative."<sup>120</sup> Because most young men flee shortly after they refuse gang recruitment and begin to experience persecution, it is likely that the applicant will still be within the age

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115. *Matter of S-E-G*, 24 I. & N. Dec. at 583-84, 2008 WL 2927590, at \*\*4-5, *disagreed with by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009). Age is not an immutable characteristic because one will simply get older, removing him or her from the danger of persecution based on age. *Id.* Persecution based solely on the age of the applicant can suffice to place him or her within a particular social group if the persecuted individual makes the claim for asylum while he or she is still within the age group. *Id.* at 584. The Board of Immigration Appeals also acknowledged that "youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed. However, this does not necessarily mean that the shared past experience suffices to define a particular social group for asylum purposes." *Id.* (citing *Gomez v. INS*, 947 F.2d 660, 663-64 (2d Cir. 1991)). A particular social group cannot be circularly defined by the type of persecution endured. *Id.* (citing *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)).

116. Walker, *supra* note 6.

117. 608 F.3d at 109 (holding that the purported definition of the particular social group lacked particularity because the term "young" is amorphous).

118. 24 I. & N. Dec. at 585, 2008 WL 2927590, at \*\*6 (holding that defining the purported social group as "young males who refuse gang membership" lacks particularity because what constitutes "young" is relative and is, therefore, not particular), *disagreed with by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

119. *Larios*, 608 F.3d at 109.

120. *Matter of S-E-G*, 24 I. & N. at 585, 2008 WL 2927590, at \*\*6.



range of the purported social group during the adjudication of his asylum claim.<sup>121</sup>

*b. Gender Limitation*

The second criterion, that the applicant is male, is not only immutable but is also sufficiently narrow and particular to satisfy the United States courts.<sup>122</sup> This principle first arose in the landmark asylum case of *Matter of Acosta*, in which the Board of Immigration Appeals specifically listed sex as a common, immutable characteristic<sup>123</sup> which might constitute grounds for asylum if the applicant's sex was the motivation for the persecutor's actions.<sup>124</sup> Here, transnational criminal gangs like MS-13 and Mara 18 generally recruit males.<sup>125</sup> Therefore, a male applicant within the age range of recruitment has case law to support his claim based on sex and age where the persecution is a result of these characteristics.

*c. Refusal of Membership in the Recruiting Gang*

The last characteristic in the author's proposed definition of particular social group is that the applicant must have refused membership in the gang. The Attorney General will not grant asylum to an individual who has participated in the persecution of another person based on any of the five enumerated grounds<sup>126</sup> or who has "committed a serious nonpolitical crime outside of the United States."<sup>127</sup> Therefore, if the Attorney General produces

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121. Federal law requires that refugees apply for asylum within one year of their arrival in the United States. 8 U.S.C.A. § 1158(a)(2)(B) (2006); INA § 208(a)(2)(B) (2010), available at <http://www.uscis.gov>. Because there is a backlog of immigration cases, applicants who are close to the age cutoff risk aging out of the purported social group. However, neglecting to place an age cap on the group will result in courts denying asylum for failure to define the group with sufficient particularity. See, e.g., *Larios*, 608 F.3d at 109; *Matter of S-E-G-*, 24 I. & N. at 585, 2008 WL 2927590, at \*\*6.

122. See *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (citing *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005)) (recognizing that gender is an "innate characteristic" that is "fundamental to [one's] identity"); see also *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993) (recognizing that persecution based on gender may constitute persecution based on membership in a particular social group).

123. 19 I. & N. Dec. 211, 233 (B.I.A. 1985) overruled in part on other grounds by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

124. See 8 U.S.C.A. § 1101(a)(42)(A) (2006); INA § 101(a)(42)(A) (2010), available at <http://www.uscis.gov>; *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

125. Walker, *supra* note 6.

126. 8 U.S.C.A. § 1101(a)(42)(B) (2006); 8 U.S.C.A. § 1158(b)(2)(A)(i) (2006).

127. 8 U.S.C.A. § 1158(b)(2)(A)(iii) (2006).

evidence that the applicant engaged in gang activities in the past, the government will deny asylum if the applicant persecuted persons in his country of origin or committed serious crimes outside of the United States. The applicant must have always remained steadfast in refusing to join a gang and not merely have experienced a change of heart after having been a gang member.

Additionally, the applicant must show that the persecution was on account of his membership in a particular social group.<sup>128</sup> In order to prove that the gang persecuted the applicant based on his membership in a particular social group (i.e. eleven- to twenty-one-year old males who refused membership), the applicant can present evidence, such as affidavits, news articles, photographs, threatening notes from the gang, et cetera, that the persecution began when he refused membership in the gang and that gang members gave the applicant the ultimatum to join or die. Using this model, the applicant has presented evidence that the social group existed prior to his persecution<sup>129</sup> and that there is a nexus between the applicant's membership in the social group and the persecution the applicant suffers.<sup>130</sup> In other words, because the eleven- to twenty-one-year-old male refused membership in a gang, the gang began to persecute him.

## 2. *Satisfying the Social Visibility Requirement*

Moving on to the second requirement, social visibility,<sup>131</sup> the applicant must prove that his social group—males between the ages of eleven and twenty-one years who refuse gang membership after being recruited—is socially visible. In order to demonstrate social visibility, an asylum applicant must meet two conditions: (1) “the citizens of the applicant’s country would consider individuals with the pertinent trait to constitute a distinct social group” and (2) “the applicant’s community is capable of identifying an individual as belonging to the group.”<sup>132</sup>

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128. See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

129. *Id.*

130. See 8 U.S.C.A. § 1101(a)(42)(A) (2006); INA § 101(a)(42)(A) (2010), available at <http://www.uscis.gov>; *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

131. See *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012); *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586-88, 2008 WL 2927590, \*\*7-9 (B.I.A. 2008), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

132. *Rivera-Barrientos*, 666 F.3d at 650-51.

a. *First Condition of Social Visibility: Do Citizens Consider the Purported Group to be a Distinct Social Group?*

The first condition of social visibility is that the citizens of the applicant's country of origin "would consider individuals with the pertinent trait to constitute a distinct social group."<sup>133</sup> An applicant can demonstrate that citizens of his country would consider recalcitrant male recruits between the ages of eleven and twenty-one years to constitute a distinct social group by providing evidence that people use a particular word to describe males of different age groups or by demonstrating that unwilling recruits are identifiable as a group by the recruiting gang. The first suggestion, that the applicant demonstrates that people use different words to describe males of different ages, is a bit weaker than the second proposition. At any rate, it is worth exploring. The Spanish words "niño," "chico," and "muchacho" all translate to mean "boy." However, each word carries its own connotation: "niño" is used to describe very young boys, like toddlers; "chico" usually means a boy slightly older but not yet a teenager; "muchacho" means a boy in his teens to very early twenties.<sup>134</sup> If the applicant can demonstrate that persons in his country refer to him as a "muchacho," for example, it is likely that the citizens of that country view him as falling within the proposed age range of eleven to twenty-one years. Citizens of the applicant's country also are likely to recognize these young males as refusing gang membership because gangs often make very public their efforts to intimidate<sup>135</sup> so that it serves as both specific and general deterrence.

The second suggestion for demonstrating that citizens of the applicant's country would consider recalcitrant male recruits between the ages of eleven and twenty-one to be a distinct social group forces the court to adopt a definition of the word "citizens." Absent more specific language, it appears that it is not necessary that *all* citizens recognize this particular social group, but rather that *any* citizens recognize the group. Because the persecutors are gang members, it makes sense to adopt their definition of the par-

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133. *Id.*

134. This categorization of the words for "boys" is the general rule as understood by the author. Some regional differences may apply.

135. Walker, *supra* note 6 (describing event in which MS-13 sent dismembered bodies with threatening notes to Honduran President Ricardo Maduro and Guatemalan President Oscar Berger).

ticular social group that they target. It does not matter how the culture as a whole views the members of the purported social group because it is not the entire culture that is persecuting the males; what is important is how the persecutors view the persecuted. If the persecutors target certain people because they see the victims as members of a group, then that is also how courts should define the group. Therefore, once an applicant establishes that others—in this case, the gang members themselves—view people who (1) are between the ages of eleven and twenty-one years, (2) are male, and (3) were approached for membership in a transnational criminal gang but refused, as a distinct group, he satisfies the requirements for particularity<sup>136</sup> and the first condition of social visibility.<sup>137</sup>

*b. Second Condition of Social Visibility: Can the Applicant be Identified as a Member of the Group?*

The applicant must also prove that he satisfies the second condition of social visibility, that the applicant's community is capable of identifying the applicant as belonging to the group.<sup>138</sup> While the first condition focuses on whether there is a distinct social group in the eyes of the applicant's community, the second condition focuses on the community's view of the individual applicant as part of that distinct social group. In order to satisfy this second condition, all that the applicant needs to prove is that he specifically is (1) between the ages of eleven and twenty-one years, (2) male, and (3) was approached for membership in a gang but refused. The applicant can easily prove the first two traits by presenting a birth certificate, school registration, medical records, or some other document that verifies his sex and date of birth. By presenting evidence that others in his community refer to him using words like "muchacho," the applicant can prove that people in his community identify him as a male between the ages of eleven and twenty-one.

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136. See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. at 584, 2008 WL 2927590, at \*\*5, *disagreed with by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

137. See *Rivera-Barrientos*, 666 F.3d at 650-51; see also *Matter of S-E-G-*, 24 I. & N. Dec. at 587, 2008 WL 2927590, at \*\*8, (finding that there is no societal perception of a group where the record did "not suggest that victims of gang recruitment are exposed to more violence or human rights violations than other segments of society"; however, if the applicant can submit evidence that recalcitrant recruits are treated more severely or suffer harm and threats more frequently, it may be possible to persuade the judge that he does, in fact, constitute a member of a distinct group in the eyes of the gang.), *disagreed with by* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

138. See *Rivera-Barrientos*, 666 F.3d at 650-51.

Items such as affidavits, threatening notes from the gang, and photographs of injuries or damage to the applicant's property at the hands of the gang can constitute evidence that the applicant was approached by the gang but refused membership. Because gangs often make their threats public,<sup>139</sup> the applicant's community will be capable of identifying the applicant as having refused membership in the gang. Once the applicant demonstrates that he satisfies the particularity and social visibility requirements, he has overcome the first hurdle to a successful asylum claim.

*B. Denial of Applicant's Claim for Asylum for Failure to Establish Past Persecution*<sup>140</sup>

In addition to the particularity and social visibility requirements, the asylum statute also requires that an applicant establish past persecution or a well-founded fear of future persecution.<sup>141</sup> Neither the statute nor the regulations requires physical harm in order to prevail on a persecution claim.<sup>142</sup> Courts have held that "[p]ersecution includes threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom,"<sup>143</sup> but it does not "encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional."<sup>144</sup> Although a successful asylum claim does not require that the applicant have suffered persecution in the form of physical harm, courts will nonetheless often deny a grant

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139. Walker, *supra* note 6; see also *supra* note 53.

140. The author would like to note that where the applicant has established past persecution based on one of the five ground enumerated in 8 U.S.C.A. § 1101(a)(42)(A), the government can rebut the presumption that the applicant will continue to be persecuted if returned to his country of origin by proving that the conditions in the applicant's country of origin have changed. See *Matter of Chen*, 20 I. & N. Dec. 16, 18, 20-21 (B.I.A. 1989) (concluding that Chinese applicant who suffered religious persecution during the Chinese Revolution in the 1970s no longer had a well-founded fear of religious persecution in 1989 because the Chinese government had become much more lenient toward "mere religious activity"). However, because the conditions of the Central American countries at issue have not changed with respect to the pervasiveness of transnational criminal gangs and the lack of government control over those gangs, establishing a well-founded fear of future persecution will not need to be discussed in this article.

141. See Davis & Atchue, *supra* note 51, at 85 (citing 8 U.S.C. § 1101(a)(42)(A)-(42)(B) (1999) and 8 C.F.R. § 208.13(b)(1) (1999)).

142. See *id.*

143. Aquino-Rivas v. Attorney Gen. of U.S., 431 Fed. Appx. 200, 202 (3d Cir. 2011) (citing Wong v. Attorney Gen. of the U.S., 539 F.3d 225, 232 (3d Cir. 2008)).

144. Fatin v. I.N.S., 12 F.3d 1233, 1240 (3d Cir. 1993).

of asylum where the applicant cannot produce evidence of severe physical injury.<sup>145</sup>

However, applicants who are fleeing from gang recruiters generally can prove that they have suffered persecution at the hands of the gang that tried to recruit them. Where the recalcitrant recruit has been beaten severely, especially repeatedly, he meets the “physical harm” test followed by the United States Courts of Appeals for the Sixth,<sup>146</sup> Seventh,<sup>147</sup> and Tenth Circuits<sup>148</sup> as well as the more lenient thresholds of the First<sup>149</sup> and Ninth Circuits.<sup>150</sup> Because it is not unusual for gang members to physically harm those who oppose the gang,<sup>151</sup> the applicant will likely be able to demonstrate that he suffered persecution by presenting evidence that the gang repeatedly physically harmed the applicant for his refusal to join. This evidence can be in the form of affidavits, newspaper clippings, medical records, and photographs.

It is also not unusual, however, for gangs to refrain from using physical violence as a means of intimidation and to resort to threats instead. Gangs typically respond to refusals to join their ranks by threatening the recruit with death or severe bodily injury or by threatening the recruit’s family.<sup>152</sup> However, “[t]hreats can constitute past persecution only in the most extreme circumstances, such as where they are of a most immediate or menacing na-

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145. See Davis & Atchue, *supra* note 51, at 85 (citing *Asani v. I.N.S.*, 154 F.3d 719, 723 (7th Cir. 1998) (defining persecution as “punishment or the infliction of harm which is administered on account of” one of the five enumerated grounds)); see also *Mikhailevitch v. I.N.S.*, 146 F.3d 384, 390 (6th Cir. 1998) (holding that persecution “requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty”); *Mroz v. Reno*, No. 96-1252, 1997 WL 139762, at \*2 (10th Cir. 1997). The courts of appeals for the First and Ninth Circuits recognize that this trend leads to the “absurd result of denying asylum to those who have actually experienced persecution and were fortunate enough to survive.” Davis & Atchue, *supra* note 51, at 86 (citing *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 489 (1st Cir. 1994) and *Del Valle v. I.N.S.*, 776 F.2d 1407, 1413 (9th Cir. 1985)). The inconsistencies among the jurisdictions puts an excessive burden on refugees seeking asylum status in the United States; refugees do not have the resources to research where they should resettle in order to be recognized as having been persecuted on one of the five enumerated grounds.

146. *Mikhailevitch*, 146 F.3d at 390.

147. *Asani*, 154 F.3d at 723 (defining persecution as “punishment or the infliction of harm which is administered on account of” one of the five enumerated grounds).

148. *Mroz*, 1997 WL 139762, at \*2.

149. *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 489 (1st Cir. 1994).

150. *Del Valle v. I.N.S.*, 776 F.2d 1407, 1413 (9th Cir. 1985).

151. *Savenije*, *supra* note 30, at 650.

152. See *Walker*, *supra* note 6; see also *Corsetti*, *supra* note 13, at 428 (citing Telephone Interview with Leonel Dubon, Program Dir., Casa Alianza (Mar. & Apr. 2005)); *Corsetti*, *supra* note 13, at 428 (citing Written Correspondence with Leonel Dubon, Program Dir., Casa Alianza (Mar. & Apr. 2005)).

ture or if the perpetrators attempt to follow through on the threat.<sup>153</sup> In order to satisfy the requirement of establishing past persecution by threats alone, the applicant must prove that the gang threatened him personally and that the threats pose a real danger to the applicant's life or freedom.<sup>154</sup> It is insufficient for the applicant to show merely any treatment that our society regards as unfair or unjust.<sup>155</sup> By providing the court with affidavits of people with personal knowledge of serious, credible threats to the applicant's life or well-being, newspaper clippings reporting a threat or an attempt to carry out a threat, threatening notes from the gang, and photographs of the aftermath of a threat or an attempt to carry out a threat, the applicant can prove that he has been persecuted because his life and freedom have been jeopardized.<sup>156</sup> Evidence that members of the gang stalked the applicant with increasing frequency after his refusal or that the gang carried out some of the threats and that the actions are increasing in frequency or severity is sufficient to prove past persecution for membership in a social group consisting of eleven- to twenty-one-year-old males who have refused gang recruitment.

#### IV. CONCLUSION

Teenage boys who have come to the United States to seek refuge from the threats, beatings, and intimidation after refusing to join gangs like MS-13 or Mara 18 almost invariably have their hopes crushed once they find themselves in removal proceedings. In spite of the U.N. drafters' intention that signatory States enact laws that give the Convention Relating to the Status of Refugees a broad construction,<sup>157</sup> Congress' asylum statute is rather narrow.<sup>158</sup> Immigration judges have been hesitant to grant asylum to these scared young men because the Board of Immigration Appeals and the United States Courts of Appeals have set a high

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153. *Nzeve v. Holder*, 582 F.3d 678, 683 (7th Cir. 2009) (citing *Bejko v. Gonzales*, 468 F.3d 482, 486 (7th Cir. 2006)). While the court examined the totality of Nzeve's circumstances, where an alleged threat on Nzeve's life, about which Nzeve had learned from other members of his political party, had never been attempted to be carried out and where Nzeve continued his political affiliation for years after the alleged threat without incident, the threat itself did not contribute to Nzeve's claim for asylum. *Id.*

154. *See Aquino-Rivas v. Attorney Gen. of U.S.*, 431 Fed. Appx. 200, 232 (3d Cir. 2011)

155. *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir.1993).

156. *See Aquino-Rivas*, 431 Fed. Appx. at 232.

157. UNHCR, Convention and Protocol, *supra* note 47.

158. *Davis & Atchue*, *supra* note 51, at 81 (referencing 8 U.S.C. § 1101(a)(42)(A) (1994) and 8 C.F.R. § 208.13(b)(1) (1999)).

threshold for establishing membership in a particular social group and past persecution in such situations.<sup>159</sup> The courts have denied granting asylum to these teenage males because their proposed definition of “particular social group” lacked either particularity<sup>160</sup> or social visibility<sup>161</sup> or because they have failed to demonstrate that they have been persecuted.<sup>162</sup> Because judges do not grant asylum to these young men, thousands upon thousands lose hope in the United States’ willingness and ability to offer refuge to vulnerable persons. As a result, the applicants return to the very countries where their persecutors reside.

Attorneys and accredited representatives can increase the likelihood of obtaining asylum for the teenage men fleeing from gang retaliation by proposing a social group with the following parameters: (1) between the ages of eleven and twenty-one years, (2) male, and (3) refusing gang membership after being approached. Courts will likely consider such a group to be sufficiently particular and socially visible if the attorney supports his or her proposition with case law. Ideally, courts would have considered the policy of the statute to be consistent with the intention of the U.N. Protocol—that States enact legislation providing a way for persecuted persons to obtain safety and resettlement. Unfortunately, courts have interpreted the statute rather narrowly and have issued orders of removal to persons with legitimate claims for asy-

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159. See, e.g., *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003); *Asani v. I.N.S.*, 154 F.3d 719, 723 (7th Cir. 1998) (defining persecution as “punishment or the infliction of harm which is administered on account of” one of the five enumerated grounds); *Mikhailevitch v. I.N.S.*, 146 F.3d 384, 390 (6th Cir. 1998) (holding that persecution “requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty”); *Mroz v. Reno*, No. 96-1252, 1997 WL 139762, at \*2 (10th Cir. 1997); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585, 2008 WL 2927590, at \*\*6 (B.I.A. 2008) (holding that young males who refuse gang membership lacks particularity because what constitutes “young” is relative and is not particular), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

160. See *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (holding that the purported definition of particular social group lacked particularity because the term “young” is amorphous); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009), *abrogation recognized by Iraheta v. Holder*, 532 Fed. Appx. 703 (9th Cir. 2013) (recognizing that while the central holding of the *Ramos-Lopez* decision is still good law, to the extent that it mischaracterizes the social visibility requirement, it is no longer good law); *Matter of S-E-G-*, 24 I. & N. Dec. at 585, 2008 WL 2927590, at \*\*6 (holding that young males who refuse gang membership lacks particularity because what constitutes “young” is relative and is therefore not particular), *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

161. See *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012); *Larios*, 608 F.3d at 109; *Barrios*, 581 F.3d at 855; *Matter of S-E-G-*, 24 I. & N. Dec. at 588, 2008 WL 2927590, at \*\*8, *disagreed with by Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

162. *Davis & Atchue*, *supra* note 51, at 82.



lum. However, now that such precedent has been established, attorneys and their refugee clients have quite an onerous task in proving eligibility for a grant of asylum. Such a task is difficult, and often nearly impossible, for persons who flee in secret. Until Congress promulgates an asylum statute consistent with the broad construction of the U.N. Convention Relating to the Status of Refugees or until courts decide to overturn their precedent by applying a more liberal construction to the asylum statute, applicants will have to provide the court with mountains of credible and convincing evidence and narrowly define the particular social group to which they belong. Requiring these applicants to make such a showing is incompatible with the applicant's circumstances in his country of origin and is inconsistent with the United States' pledged commitment to the human rights of vulnerable peoples.